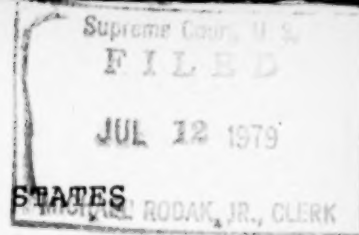


IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978



No. 78-1766

CHARLES F. MENDOLA, BARBARA A. MENDOLA
and JOSEPH L. NEMETH,

Petitioners,

vs.

EES CARPETS, MONTICELLO CARPETS,
DIVISIONS OF BURLINGTON INDUSTRIES,
INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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Respondents, Lees Carpets, Monticello
Carpets, Divisions of Burlington Industries,
Inc., respectfully request that this Court
deny the petition for writ of certiorari,
seeking review of the opinion of the
United States Court of Appeals for the
Seventh Circuit in case number 78-1106.

Statutory and Procedural Provisions

28 U.S.C.	
F.R.C.P. Rule 52	10
Fed.R.App.P. Rule 40(a) 2, 4, 7	
28 U.S.C. § 2101(c)	3, 4, 6, 7
Rule 22, Rules of the Supreme Court of the United States	3, 7

Other Authorities

5A Moore's Federal Practice	
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OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Indiana, South Bend Division (hereafter District Court), Civil Action No. S76-123, is unreported and appears as Appendix A to the Petition for Writ of Certiorari (Petition, 18-53). The opinion of the United States Court of Appeals for the Seventh Circuit (hereafter Seventh Circuit), Case No. 78-1106, is unreported and appears as Appendix B to the Petition (Petition, 54-58). Petitioners have omitted from their Petition and Appendix thereto any reference to the April 2, 1979 opinion of the Seventh Circuit which is unreported and appears at Appendix "1", infra.

JURISDICTION

The above-entitled cause was argued before, and submitted to, the Seventh Circuit on December 4, 1978, after which an opinion and judgment were entered on January 4, 1979. Subsequently, on March 28, 1979, petitioners filed a "Petition for Rehearing Before the United States Court of Appeals Seventh Circuit" in the Seventh Circuit, more than fourteen (14) days after the entry of judgment by the Seventh Circuit, which period was not enlarged by an order of the Seventh Circuit, Rule 40, Federal Rules of Appellate Procedure.

On April 2, 1979, the Seventh Circuit ordered "that the 'Motion for Recall Mandate' for the purpose of filing an untimely petition for rehearing be, and the same is hereby, DENIED. The filing of the petition for rehearing is DENIED."

The petition for writ of certiorari was filed on May 25, 1979, more than ninety (90) days since the entry of judgment by the Seventh Circuit, which period for applying for a writ of certiorari has not been extended by a Justice of this Court. 28 U.S.C. § 2101(c); Rule 22 of this Court. Conclusively, petitioners' application for a writ of certiorari is untimely and should be denied.

QUESTIONS PRESENTED

1. Whether petitioners' application for a writ of certiorari was timely filed so as to confer jurisdiction in this Court.
2. Whether the courts below properly applied Indiana law in an action against certain guarantors.
3. Whether the findings of fact by the District Court were clearly erroneous.

STATUTORY AND PROCEDURAL PROVISIONS INVOLVED

28 U.S.C. § 2101(c)
Supreme Court; time for appeal or certiorari; docketing; stay

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court for good cause shown, may extend the time, for applying for a writ of certiorari for a period not exceeding sixty days.

28 U.S.C.

Rule 40(a), Federal Rules of Appellate Procedure.

(a) Time for Filing; Content; Answer; Action by Court if Granted. A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order. . . .

STATEMENT OF THE CASE

Petitioners, Charles F. Mendola, Barbara A. Mendola, and Joseph L. Nemeth, residents of the State of Indiana, after operating a proprietorship known as The Carpet Mart in Mishawaka, Indiana, for approximately one year, executed written personal continuing guarantees on February 1, 1972, assuring the respondents, Lees Carpets, Monticello Carpets, Divisions of Burlington Industries, Inc., a Delaware corporation with its principal place of business in King of Prussia, Pennsylvania, that the petitioners would be liable for the sale of all goods and merchandise delivered to The Carpet Mart (Petition, 19-20, 25, 55).

The guarantees specifically provided that they applied to future as well as present transactions "until actual receipt by the creditor from the (Guarantors) by registered mail of written notice of termination." The agreements further provided that "This instrument cannot be changed or terminated orally . . . shall be binding upon the heirs, executors, administrators, successors, and assigns of the undersigned and shall be to the benefit of the Creditor, its successors and assigns." (Petition, 25, 55).

One day after executing the personal continuing guarantees, the individual petitioners, on February 2, 1972, incorporated The Carpet Mart under the name C & B Enterprises, Inc. and served as the corporation's shareholders, officers and directors, even though no stock was issued and no records existed regarding any corporate meetings after February 2, 1972. (Petition, 25, 26, 56). Despite their incorporation, petitioners continued to hold themselves out as The Carpet Mart, advertising, issuing checks, writing letters, and signing legal documents as The Carpet Mart through 1975. (Petition, 26-36, 56).

For carpet that was delivered to, and received by, The Carpet Mart, petitioners incurred an indebtedness to the respondents in the sum of \$88,631.09. Respondents then filed a diversity action on July 2, 1976, and after a one-day bench trial, the District Court entered judgment on

October 17, 1977, in the amount of \$88,631.09, plus eight percent interest after May 29, 1975, against C & B Enterprises, Inc., d/b/a The Carpet Mart, Charles F. Mendola, Barbara A. Mendola, and Joseph L. Nemeth. (Petition, 18-23, 50-51, 56-57).

Subsequently, on December 16, 1977, the District Court denied petitioners' motion for new trial, after which petitioners filed a timely appeal in the Seventh Circuit which, after the presentation of argument on December 4, 1978, issued its opinion and judgment on January 4, 1979 (Petition, 54-58), affirming the District Court's opinion.

On appeal, the Seventh Circuit held that the District Court properly denied petitioners a new trial, found that the evidence against the petitioners "is substantial, if not overwhelming," and that the District Court properly applied Indiana law.

REASONS FOR DENYING THE WRIT

I

Petitioners' Application For A Writ Of Certiorari Is Untimely

As provided by 28 U.S.C. § 2101(c), a petition for writ of certiorari must be "applied for within ninety days after the entry of such judgment or decree" which is sought to be reviewed. Although for good cause shown, a Justice of this Court

may extend the time for applying for a writ of certiorari for a period not exceeding sixty days, no such application was ever filed in these proceedings. 28 U.S.C. § 2101(c); Rule 22 of this Court.

On January 4, 1979, the Seventh Circuit entered its opinion and judgment affirming the decision of the District Court. If the petitioners wished to file a timely petition for rehearing before the Seventh Circuit, such petition had to be filed within fourteen (14) days after the entry of the January 4, 1979 judgment, to-wit: on or before January 18, 1979, unless the time for filing the petition for rehearing would have been enlarged by an order from the Seventh Circuit. Rule 40, Federal Rules of Appellate Procedure.

As the petitioners readily, if not blatantly admit, they did not file their petition for rehearing within the fourteen (14) day period provided by Rule 40, Federal Rules of Appellate Procedure. (Petition, 7). Instead, more than two (2) months later, petitioners filed in the Seventh Circuit a "Motion for Recall Mandate" on March 23, 1979, after which, on March 28, 1979, petitioners filed a "Petition for Rehearing Before the United States Court of Appeals Seventh Circuit."

On April 2, 1979, the Seventh Circuit ordered "that the 'Motion for Recall Mandate' for the purpose of filing an untimely petition for rehearing be, and the same

is hereby, DENIED. The filing of the petition for rehearing is DENIED."

"The filing of an untimely petition for rehearing which is not entertained or considered on its merits, or a motion for leave to file such a petition out of time, if not acted on or if denied by the trial court, cannot operate to extend the time for appeal."

Bowman v. Loperena, 311 U.S. 262, 266 (1940). Otherwise stated:

"This result follows from the well-established rule that where an untimely petition for rehearing is filed which is not entertained or considered on its merits the time to appeal from the original order is not extended."

Pfister v. Northern Illinois Finance Corp., 317 U.S. 144, 149-150 (1942).

Applying the foregoing principles to the case before this Court, it is evident that the petitioners filed an untimely petition for rehearing in the Seventh Circuit and thereafter filed an untimely petition for writ of certiorari which should be denied by this Court.

II

The Courts Below Properly Applied Indiana Law

Initially, it should be noted that the petitioners have never questioned or raised any issue in the courts below regarding the applicability of Indiana law to the guarantees which they executed. Despite this evident waiver by the petitioners, they now seek, albeit belatedly, to argue that New York law should have been applied in determining their liability under the guaranty agreements. Such a contention is, at best, unmeritorious, if not simply frivolous, especially in view of the fact that there is no conflict in the law.

The principles enunciated in Cargill, Inc. v. Buis, 543 F.2d 584 (7th Cir. 1976), which the courts below correctly applied, are no different than those of New York. Both Indiana and New York recognize the validity of a continuing, unconditional guaranty, Cargill, Inc., supra, 543 F.2d at 587, Crompton - Richmond Co., Inc., Factors v. Briggs, 560 F.2d 1195, 1200-1201 (5th Cir. 1977); Walter E. Heller & Co. v. Cox, 486 F.2d 1398 (2nd Cir. 1972), which is to be construed according to the intention of the parties, as ascertained from the instrument itself, in light of the surrounding circumstances at the time it was executed.

Simply stated, petitioners are attempting to shield themselves from liability by means of a corporation that existed in name only. Petitioners' actions themselves, as detailed by the District Court (Petition, 25 - 38) precludes such an inequitable, unjust and impermissible result. Respondent relied

upon the existing guarantees and looked to their buyer as The Carpet Mart which was the same entity before and after incorporation (Petition, 47-48; 56-58).

Petitioners' liability, under the facts of the case, is no different under either Indiana or New York law. Decidedly, the question raised by the petitioners is insubstantial and presents no conflict of law, thereby warranting a denial of their petition for writ of certiorari.

III

The District Court's Findings Of Fact Are Not Clearly Erroneous

Rule 52, Federal Rules of Civil Procedure, provides, inter alia, that:

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Explaining the applicability of the "clearly erroneous standard", this Court has stated that:

"In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo. The authority of an appellate court, when reviewing the findings of a

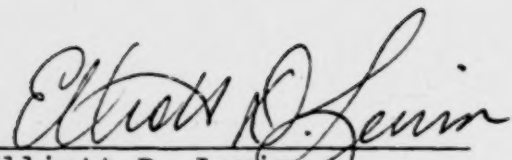
judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence. The question for the appellate court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether 'on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed.'"

Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 123 (1969); United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). See, generally, 5A Moore's Federal Practice ¶ 52.03[1] (1969).

Reviewing the entire record in this cause, it is evident that no mistake was committed by the District Court in its findings of fact. Indeed, as the Seventh Circuit appropriately observed, "[t]he evidence against these defendants is substantial, if not overwhelming." (Petition, 57).

CONCLUSION

For the reasons hereinbefore set forth, it is respectfully submitted that the petition for writ of certiorari should be denied.


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APPENDIX "1"

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

April 2, 1979

Before

Hon. HARLINGTON WOOD, JR., CIRCUIT JUDGE

Hon. _____

Hon. _____

LEES CARPETS, MONTICELLO CARPETS, DIVISIONS
OF BURLINGTON INDUSTRIES, INC.,

• Plaintiffs-Appellees,
No. 78-1106

vs.

CHARLES F. MENDOLA, BARBARA MENDOLA, and
JOSEPH L. NEMETH,
Defendants-Appellants.

Appeal from the United
States District Court
for the Northern
District of Indiana,
South Bend Division.
No. Civil S 76-123
ALLEN SHARP, JUDGE

This matter comes before the court for its consideration upon the
filing herein of the following documents:

1. "MOTION FOR RECALL MANDATE" filed herein on March 23, 1979 by
counsel for the defendants-appellants.
2. "PETITION FOR REHEARING BEFORE THE UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT" also filed herein on March 28, 1979 by counsel
for the defendants-appellants.

On consideration thereof,

IT IS ORDERED that the "MOTION FOR RECALL MANDATE" for the purpose
of filing an untimely petition for rehearing be, and the same is hereby,
DENIED. The filing of the petition for rehearing is DENIED.